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IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1979

No. 78-6932

RICHARD EARL PILON — PETITIONER

V.

Warden
~~COMMONWEALTH OF KENTUCKY~~ — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT F. STEPHENS
ATTORNEY GENERAL
Patrick B. Kimberlin, III
PATRICK B. KIMBERLIN, III
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601

COUNSEL FOR RESPONDENT

10

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The Opinion of the United States Court of Appeals for the Sixth Circuit rendered on February 26, 1979 is not yet reported but appears correctly at pages 17-24 of Petitioner's Appendix. The Memorandum Opinion of the United States District Court for the Western District of Kentucky is correctly set forth at pages 8-16 of Petitioner's Appendix. The original Opinion of the Kentucky Supreme Court may be found at Pilon v. Commonwealth, Ky., 544 S.W.2d 228 (1976).

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court should be denied because said application fails to meet the jurisdictional requirements of 28 USC § 1254(1).

The Petition for Writ of Certiorari is predicated upon the following two contentions: I. Whether, as a matter of due process of law, petitioner's conviction for first degree manslaughter is supported by sufficient evidence? II. Whether the refusal of the state trial court to instruct the jury on reckless homicide, as requested by petitioner deprived him of due process of law? The respondent submits that neither of the foregoing issues rise to constitutional proportions and therefore present nothing for this Court as a basis upon which to exercise its discretionary jurisdiction pursuant to Supreme Court Rule 19.

I.

As to the first contention, pertaining to the sufficiency of the evidence to support petitioner's conviction, it should be noted that this contention was dealt with summarily by the Sixth Circuit in its Opinion. See Pilon v. Bordenkircher, ___ F.2d ___ (rendered February 26, 1979)(footnote 1, Petitioner-Appellant's Appendix, pages 17-18). Of course, that court disposed of this issue under the authority of Brooks v. Rose, 520 F.2d 775 (6th Cir. 1975) and other similar cases which hold that where there is any evidence adduced at trial sufficient to support the verdict federal habeas corpus relief will not be granted. The respondent is cognizant of the very recent decision of this Court in Jackson v. Virginia, ___ U.S. ___ (rendered June 28, 1979) wherein the aforementioned legal principle has been rejected. However, respondent submits that the newly

created standards set out in Jackson v. Virginia, supra, may be applied to the instant case and, in doing so, they provide no reason for the grant of this Petition. Respondent urges that perusal of the evidence of record in this case requires the conclusion, as in Jackson v. Virginia, supra, that when said evidence of record is considered in the light most favorable to the prosecution a rational fact finder could readily have found the petitioner guilty beyond a reasonable doubt of first degree manslaughter under Kentucky law.

Accordingly, respondent submits that this contention does not present a substantial federal question requiring the granting of the relief now requested by petitioner. Cross v. Bruning, 396 U.S. 970 (1969); Tacon v. Arizona, 395 U.S. 238 (1969). Nor does this contention otherwise present an issue of such substance as to merit the exercise of the extraordinary discretionary review which might otherwise be extended by writ of certiorari. Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965).

II.

It should first be noted that the issue before the Sixth Circuit was whether the petitioner was entitled to an instruction on reckless homicide.[1] It appears to respondent that as this case has gradually progressed through numerous appellate courts, both state and federal, petitioner has

1/ Respondent's Brief in the Sixth Circuit urged an even narrower issue: Whether the trial court correctly rejected petitioner's requested instruction on reckless homicide.

attempted to enlarge this issue pertaining to instructions. Respondent maintains that the only issue properly before this Court is whether the state trial court violated petitioner's constitutional right to due process of law by rejecting his requested instruction on reckless homicide. The answer is no.

As dealt with at length by the Sixth Circuit in its Opinion (Petitioner-Appellant's Appendix, pages 19-24) there was no conceivable evidentiary basis in the record to support an instruction on reckless homicide. Thus, this issue can be resolved totally upon the record and it presents, like the first issue, no substantial federal question authorizing the grant of certiorari review. Cardinale v. Louisiana, 394 U.S. 437 (1969).

SUMMARY

In summary, the respondent submits that the petitioner's application for Petition for Writ of Certiorari should be denied because it fails to meet the jurisdictional requirements of Title 28 § 1254(1). The purpose of review by way of certiorari is not to give the defeated party another hearing. Also, the respondent urges this Court to deny the Petition for Writ of Certiorari in the instant case upon the grounds that it presents no substantial federal question for this Court to consider. Cardinale v. Louisiana, 394 U.S. 437 (1969). Certiorari jurisdiction is a creature of discretion and in the instant case the petitioner has clearly failed to establish that this Court should exercise its discretion to grant review by certiorari. Supreme Court Rule 19.

The respondent will now endeavor to respond to the contentions raised by the petitioner as though those contentions were properly before the Court, even though respondent maintains that they are not.

COUNTERSTATEMENT OF THE CASE

On July 22, 1975, the Jefferson County Kentucky Grand Jury returned an indictment against Richard Earl Pilon for committing first degree manslaughter, as proscribed by KRS 507.030. (Transcript of Record, hereinafter TR, 2). On July 25, 1975, Pilon waived formal arraignment and entered a plea of not guilty. (TR, 3). At a jury trial held on December 1-2, 1975, in Jefferson Circuit Court, Criminal Branch, First Division, a verdict of guilty was returned, and Pilon's punishment was fixed at confinement in the state penitentiary for 10 years. (TR, 11; Transcript of Evidence, hereinafter TE, 1). Pilon appealed to the Supreme Court of Kentucky which subsequently affirmed his conviction in Pilon v. Commonwealth, Ky., 544 S.W.2d 228 (1976). Thereafter Pilon filed a petition for writ of habeas corpus in the United States District Court for the Western District of Kentucky, at Louisville, Honorable Charles M. Allen presiding judge. However, the respondent was granted summary judgment by that court on May 8, 1978. That decision was affirmed on appeal to the United States Court of Appeals for the Sixth Circuit. Pilon v. Bordenkircher, ___ F.2d ___ (decided February 26, 1979). This Petition now results.

COUNTERSTATEMENT OF THE FACTS

Marvin Cole Marcum died on May 8, 1975, the victim of a brutal beating. He was 17-months-old at the time of his death. Other than being slightly pigeon-toed, Marvin had no physical defects and appeared to be a normal, healthy baby. On the last day of his life, Marvin and his three-year-old sister, Stacy, were living in a trailer with their mother and Pilon, her boyfriend, in Jefferson County, Kentucky. At approximately noon that day Pilon and Marvin's mother arose from bed and began to start their day. Thereafter, at approximately 2:30 P.M. Pilon drove Mrs. Marcum to her place of employment, with the two children in the back seat of the car. No sooner had Mrs. Marcum left the car than little Marvin became ill and threw up. Mrs. Marcum was called back to the car, whereupon she cleaned up after the child and advised Pilon to take him to a hospital if he became ill again. She also gave Pilon her medical assistance card. Pilon then drove home with the children and remained there until 3:45 P.M., when he took the children to Dr. Kincaid's office in order that the doctor could examine a hand injury of the petitioner's. While at the office Dr. Kincaid noticed that little Marvin was extremely pale, so pale that his lips seemed white. Dr. Kincaid told Pilon that the child appeared to be gravely ill and should be taken to a hospital. (TE, 175-181). Pilon denied being told this by the doctor. (TE, 153).

At approximately 5 P.M. Pilon left the doctor's office with the two children and returned home, at which

time he made a telephone call to Mrs. Marcum at work, and told her about the doctor's examination and mentioned that little Marvin was playing. (TE, 127). A short time later, Pilon again left the trailer and drove with the baby to the home of Richard Childers, a friend, and asked him if he thought the child was sick. Childers came out to the car and observed that the baby appeared to be very sick and pale. (TE, 48-49). Childers had seen the child just a few days before and at that time, the baby appeared normal and healthy with no bruises. (TE, 50). Childers did not observe any bruises on the child that evening. (TE, 50). By now it was after 6 P.M. and Pilon finally called Mrs. Marcum at her place of employment and allegedly told her that the child was extremely ill. With the child in the back seat of the car, he proceeded to the restaurant where Mrs. Marcum worked, picked her up, and they drove to the hospital. Upon arrival at the hospital, Mrs. Marcum screamed for assistance and a doctor immediately ran to the car, took the baby out and rushed to the emergency room. However, by now it was too late. The doctor observed that the baby was dead on arrival, although an attempt was made at the hospital to revive him.

At trial it was clearly established that Pilon was the only adult constantly with the baby throughout the course of the last day of the child's life. It was further established that the child's body was covered from head to toe with bruises and abrasions and some lacerations. (TE, 80, 110, 174). The cause of death was determined to be a tear or rupture in the child's spleen, which subsequently caused him to bleed to death internally.

The defense attempted to show that the child was overly clumsy for his age and prone to fall down and bruise rather easily. However, medical evidence established that the baby had no bruises when he had been thoroughly examined as recently as April 11, 1975, (TE, 105), and was found to be perfectly normal in every way, with the exception of being slightly pigeon-toed. (TE, 95-98). The testimony of the doctors as to the extent of the bruises, a condition also known as ecchymosis, was made clearer by a number of photographs of the child's corpse taken shortly after the child was pronounced dead at Norton's Children's Hospital in Louisville, Kentucky.

Pilon denied beating or in any other way harming the child even though the child was solely in his care at different periods during that day. He accounted for the bruises, as previously noted, by referring to the child's clumsy nature. Again, the medical testimony indicated that the bruising on this child was not usual but was quite out of the ordinary, so much so in fact that the doctor who attempted to revive the child at Norton's immediately advised the authorities that this might involve a case of a "battered" child. (TE, 71-72).

Furthermore, the rupture of the spleen was due not to any disease or deformity but to a trauma caused by extreme force. It was also established that the bruises would also be caused by trauma. Exactly when or why Pilon spent his fury upon this innocent and defenseless child is not known. However, what is sure is that the life of this 17-month-old baby boy was taken by Pilon in a brutal and senseless beating. The refusal of Pilon to take the child to a hospital, even though he had been advised to do so by a doctor (and by the

mother if the child appeared worse), even though Pilon had been given a medical assistance card by the mother to present at the hospital, merely magnifies and compounds Pilon's guilt.

The jury disregarded Pilon's assertion of innocence and found him guilty. Even so, the jury mercifully sentenced him to only ten years imprisonment, which is a light punishment indeed compared to the heinous and inexcusable act that was perpetrated upon this child in such a particularly cruel manner. Obviously not satisfied with the results of his state court trial, the Opinion of the Kentucky Supreme Court, the District Court, or the Sixth Circuit Court of Appeals, Pilon now brings this Petition for a Writ of Certiorari.

ARGUMENT

I.
THE PETITIONER'S CONVICTION IS SUPPORTED BY SUFFICIENT EVIDENCE OF RECORD.

The evidence of record in this case as reflected in the opinions of the various lower state and federal courts establishes beyond cavil that, when considered in the light most favorable to the prosecution, a rational fact finder could readily have found the petitioner guilty beyond a reasonable doubt of first degree manslaughter under Kentucky law. Jackson v. Virginia, ___ U.S. ___ (rendered June 28, 1979). For the sake of brevity the respondent will not reiterate the ample evidence of the prosecution establishing petitioner's guilt. But, respondent does submit that given those facts in the record petitioner's present contentions as to alleged insufficiency of the evidence to support his conviction as violative of federal Due Process standards is unfounded. Therefore, respondent respectfully submits that this contention presents no basis for the grant of the Petition for Writ of Certiorari.

II.

THE PETITIONER WAS NOT DENIED DUE PROCESS OF LAW WHEN THE STATE TRIAL COURT REFUSED TO INSTRUCT ON RECKLESS HOMICIDE.

Petitioner vigorously maintains that he was unconstitutionally burdened with disproving his guilt and thus deprived of Due Process of Law when the state trial court refused to instruct the jury as to an alleged lesser included offense of reckless homicide. However, as previously noted in respondent's Jurisdictional Statement, there was no evidence adduced at trial to establish that petitioner was entitled to an instruction on reckless homicide. The Sixth Circuit Opinion as well as the Opinion of the Kentucky Supreme Court dealt at length with this issue and came to similar conclusions.

Under Kentucky law there had to be proof in the record that the petitioner acted "recklessly" in causing the death of the baby boy. The petitioner at trial denied any guilt with respect to the death of his victim. The only possible basis for a reckless homicide instruction would have been premised on a hypothesis that the jury might have found that the petitioner did not beat the victim but acted culpably in not taking the victim to a hospital after Dr. Kincaid recommended that the petitioner do so.

However, even this scenario would not have constituted reckless homicide under Kentucky law since the advice of Dr. Kincaid would have made petitioner aware of the risk to the victim if not taken to the hospital. Under Kentucky law, reckless homicide is defined as occurring when one "fails to perceive a substantial and unjustifiable risk"

of death. See KRS 507.050(1) and KRS 501.020(4). Accordingly, the evidence in this case did not support the giving of a reckless homicide instruction. Thus, petitioner's contentions of alleged denial of Due Process are without merit as are his claims of allegedly having to disprove his guilt in an unconstitutional fashion.

CONCLUSION

For the foregoing reasons the respondent respectfully submits that the petitioner has failed to meet the jurisdictional requirements of 28 USC § 1254(1) and therefore the Petition for Writ of Certiorari should be denied. As additional grounds for the denial of the Writ, it is submitted that the petitioner has failed to present a substantial federal issue which would invest this Court with jurisdiction. To the contrary, the two contentions presented by petitioner are clearly and unequivocally refuted by the evidence of record. For the above stated reasons the respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT F. STEPHENS
ATTORNEY GENERAL

Patrick B. Kimberlin, III

PATRICK B. KIMBERLIN, III
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601

COUNSEL FOR RESPONDENT